In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

I

The Court has considerably clarified the guiding principles of judicial review of administrative action since the first argument of the questions presented in this case. In these decisions we find both specific support for many of our detailed contentions and an authoritative bulwark for our earnest plea that sound government requires cooperation

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rather than conflict between the courts and administrative agencies.

1. *The Substantive Rights of the Farmers Should Be Protected.*—In our main brief (pp. 18–23, 71–76) we urged that Section 305 of the Packers and Stockyards Act gave the farmers a substantive right to be charged only reasonable rates, and that the procedural sections were left extremely general in order that there might be the most flexible and effective adaptation to this end which would be possible. This argument requires, in other words, that the procedural safeguards be construed to harmonize with and not to override the basic policy of the statute. In *Keifer and Keifer* v. *Reconstruction Finance Corporation,* No. 364, this Term, the Court held a government corporation liable to suit, although there was no express consent, in largest part because the customary policy of Congress in creating similar corporations was to deny immunity. "The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute * * * but in a series of statutes * * *." It seems improbable that this salutary canon of statutory construction could be of such halting application that it must be abandoned when the Court is urged to construe Section 310 in the light of the cornerstone of the very Act in question.

2. *Further Proceedings Before the Administrative Body are Appropriate Means to Correct Pro-*

cedural Error.—The main brief for the appellants urges that the appropriate means by which to correct a procedural error such as that here involved is to permit further proceedings before the administrative body (pp. 32–60). Except for possible distinctions between direct and collateral review, this principle is now settled by *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364. There, because of a fear that the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1, might have application to its administrative procedure in the *Ford Motor Co.* case, the Labor Board moved that the case be remanded from the Circuit Court of Appeals for further proceedings to correct possible errors of procedure. The lower court granted the motion and this Court affirmed. Its decision, in substance, was that such a remand would have been an appropriate consequence of a reversal because of procedural error, and that it accordingly was an appropriate order to enter on the Board's own motion. That decision governs here unless appellees can establish a controlling distinction between the statutes.

The opinion of the Court seems to make clear that the decision rested on broad foundations and went to the nature of judicial review of administrative action rather than to any particular wording of the National Labor Relations Act. It determined (pp. 373–374) that a remand for further proceedings would be an appropriate consequence of reversal for procedural error because of three considera-

tions: (a) An analogy was drawn to review of district courts; we have here drawn a comparable analogy in our main brief (pp. 33–39). (b) The Court said (p. 373):

> The jurisdiction to review the orders of the National Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. * * *

This broad ground is equally applicable to the present case. (c) Finally, the Court relied upon somewhat related decisions under the Federal Trade Commission statute. This consideration is not directly applicable to collateral review by a three judge district court. The Court, however, cited for comparison cases where new hearings had been directed after injunctions had been granted against enforcement of administrative orders on such a collateral review. So even this factor has some application in the present case.

3. *The Duty of a Court of Equity.*—In its simplest terms, our argument is that a court of equity which enters an interlocutory decree enjoining enforcement of an administrative order must use it

powers to accomplish and not to frustrate substantive justice. This duty has unequivocally been declared in *Inland Steel Co.* v. *United States,* No. 227, this Term.

There the Interstate Commerce Commission had directed the carrier to cease and desist from making an allowance to the shipper for spotting cars. The shipper sought review of the order, and the three-judge court entered an interlocutory injunction staying the order and suspending the revised tariff filed by the carrier "pending the further order of the court." The injunction further provided that the shipper should set up the amount of the allowances in a special account, to be paid to the carrier or canceled as the court should direct. The District Court sustained the order of the Commission and directed the allowances to be paid to the carrier; only the latter provision of the decree was challenged in the appeal to this Court, and it was affirmed. The opinion of the Court proceeds upon a broad front and is directly applicable here, since the Packers and Stockyards Act in Section 316 adopts the provisions for judicial review of the orders of the Interstate Commerce Commission.

The shipper's contention that it was entitled to retain the accumulated fund because the court lacked jurisdiction to do more than vacate the interlocutory injunction and dismiss the petition was rejected (p. 3), because it overlooked "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions

that will protect all—including the public—whose interests the injunction may affect."

The Court set forth the duty of an equity court to condition its interlocutory relief against administrative orders, and to apply the conditions so as to ensure that the statutory purpose would be protected. Its reasoning seems to dispose of the basic problems in the present case. The Court said (p. 4):

> * * * the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system. The District Court, * * * properly took steps to protect the other interests—represented by the Commission—from injuries that the injunction might cause. * * * This segregated account thus accrued as a result of judicial restraint of administrative proceedings in which the payments had been declared unlawful. When the Court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the Court promptly to allocate the fund to its lawful owner.
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> An Equity Court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund. Otherwise, rights

(such as the right of this Railroad to restitution) might be impaired or cut off while an interlocutory injunction is in effect, as for instance by statutes of limitations. Here, the Court had the power and it was its duty so to fashion its equitable decree that appellant should not be the beneficiary of unlawful payments, and to prevent the dissipation of the Railroad's assets through unlawful preferences.

It is true that in this case it has not yet finally been determined that the appellees have no lawful claim to the impounded fund. Whether they may lawfully claim all, or none, or some part of that fund cannot be said until the Secretary has entered an order on reconsideration[1] and until the order, if proceedings for review are brought, has been considered by the courts. But, since a court of equity must be solicitous that its processes are not used to make unlawful payments, it must be equally solicitous that they are not used irretrievably to make payments of impounded funds which may well be contrary to law. Until the Secretary, after full hearing with due expedition, determines what were the reasonable rates to be charged no final decision as to the ownership of the fund can be made. The *Inland Steel Co.* case, therefore, would

[1] For the information of the Court, the Appendix contains a letter from the Solicitor of the Department of Agriculture summarizing the course of proceedings before the Secretary since his order of June 2, 1938, reopening proceedings in this case.

seem to settle that the District Court has the duty of continuing to hold the impounded fund to await the determination of the Secretary.

It is, therefore, respectfully submitted that the recent decisions of this Court compel recognition of the guiding principles of equity jurisdiction and of sound government in the review of administrative proceedings. These principles cannot permit the appellees finally to receive moneys which have been determined to belong to the farmers not only by the Secretary in the faulty hearing but also by the District Court, which twice has found that the Secretary's findings were supported by the weight of the evidence.[2]

II

Appellees have filed an extended brief on reargument. Most of the arguments were presented on the first hearing of this appeal and are adequately discussed in our main brief. We shall here add only a word or two in respect to a few points which are presented in a somewhat different form than on the first argument.

1. *Case or controversy.*—On the first argument, appellees urged that this Court had no jurisdic-

[2] Appellees in their brief on reargument charge that we are neither frank nor fair in this statement (pp. 151–152). We are content to refer the Court to the record, either through our main brief (pp. 21–22) or through appellees' brief (pp. 6–8, 149–152), for substantiation of what we should have thought to have been clear beyond controversy.

tion of the appeal and that the court below had a mere ministerial duty to release the funds to them. This argument now reappears in the guise of the somewhat startling proposition that no case or controversy is presented to this Court (Br. 36–42). But the same decisions which show that there is jurisdiction dispose of any contention that no case or controversy is presented. *Berman* v. *Illinois Bell Telephone Co.*, 304 U. S. 549; *Inland Steel Co.* v. *United States*, No. 227, this Term.

2. *Separation of Powers.*—The Government's argument that the processes of both courts and administrative agencies should be adapted in a cooperative effort to ensure both procedural safeguards and substantive justice is vigorously attacked on the ground, *inter alia*, that this would involve disregard of the constitutional mandate that judicial and legislative or executive powers should be separately exercised (pp. 33, 69, 123–128, 131). We are more impressed by the boldness than the force of the argument, and mention it because it illustrates so well the pervading fallacy of appellees' position. Throughout their brief they assume that the Packers and Stockyards Act provides judicial review of the Secretary's orders so that he may be punished for transgression, and that the courts are cast in the role of umpires of an intricate trial by battle between the Secretary and those whom he regulates. From this view the courts in truth would seem to invade a nonjudicial field if in their decrees they

gave aid to the objectives sought by one of the contestants.

But, happily, this is not the case. Section 305 of the Packers and Stockyards Act provides that "all rates or charges * * * shall be just, reasonable, and nondiscriminatory." To implement this basic provision, Sections 310 and 316 provide for rate proceedings before the Secretary and for judicial review of his orders. Section 305 is not merely an occasion for instituting proceedings, which thereupon become ends in themselves, but is a law which binds alike the appellees, the Secretary, and the courts. All the requirements of the procedural sections must be enforced, but so, too, must the fundamental mandate of the statute. A court of equity, then, hardly can do otherwise than to mold its decrees to permit accomplishment of both procedural and substantive justice. The cooperation, as we urge, of both courts and administrative agencies to permit orderly government and the attainment of statutory purposes has to our kowledge never before been condemned as an unconstitutional intermingling of judicial and legislative or executive powers.

3. *The History of the Interstate Commerce Act.*—The appellees devote much attention to the gradual evolution of the Interstate Commerce Act (pp. 78–99). Their argument here seems to be that a number of omissions or deficiencies in procedural powers have been discovered and have subsequently been remedied by Congress; from this the conclu-

sion is drawn that any procedural defects in the Packers and Stockyards Act must await Congressional action. There is no contention that any of the omissions or defects of the Interstate Commerce Act which are discussed have pertinent relation to the procedural point now in issue. More importantly, the argument begs the very question in issue. We deny that there is any procedural defect in the Packers and Stockyards Act and insist that the broad framework of the procedural sections leaves ample room for the administrative agency and the reviewing court, armed with the powers of a court of equity, to ensure that procedural safeguards are reconciled with substantive justice.

4. *The Rate-Making Powers of the Courts.*—Appellees insist that the court below had no power to fix rates (pp. 116–123). The courts, by Section 308, are placed under a duty to enforce the substantive mandate of Section 305 that rates should be reasonable. This, of course, does not reach to the power to prescribe rates for the future. But we fail to see how retention of the impounded funds until the Secretary has reconsidered his earlier order in a full hearing has any element of rate-fixing.

5. *Abuse of Administrative Powers.*—Appellees' brief on reargument discloses perhaps more fully than before the serious implications of their position. The Secretary, they urge, should be denied all opportunity to correct procedural error because "it is idle to suggest that * * * the administrative agency will deal out even-handed justice

with an open mind" (pp. 127–128). The reconsideration of the Secretary, which we have urged would permit determination of the extent of the substantive prejudice resulting from the faulty procedure in the first hearing, "would become a hollow mockery" (p. 130). The Secretary, in future proceedings, might make a "snap order" on little or no evidence, submit to injunction by the courts, and then reissue the order (p. 153). The Secretary has a wide power to fix rates and, unless penalized for transgression of procedural requirements, will be apt to harass those whom he regulates (pp. 138–141).

We think that appellees' position can be explained or supported only upon premises such as these. We wish to protest their adoption by appellees, and to state our belief that it is unthinkable that this Court should sanction such postulates in its decision. The administrative agency has difficult and important decisions to make. It may, as may courts, make mistakes.[3] But there can be no assumption that administrative agencies are not conscientious and fair minded; or that, while a court can be trusted to correct procedural error, an administrative agency cannot. If judicial review were to be based upon premises such as these, whether expressed or implicit, the result would inevitably be to encourage the growth of administra-

[3] For data as to the comparative frequency of reversals by the Supreme Court of administrative agencies and of courts, see 1938 Report of the Attorney General, pp. 40–49.

ve irresponsibility and to engender an hostility etween courts and administrative agencies which ould impair the respect due to each in its sphere.

CONCLUSION

It is therefore respectfully submitted that the ecision of the court below should be reversed, and at the cause should be remanded with directions hat the impounded fund be held for distribution s the reconsidered order of the Secretary should ndicate, subject, of course, to the right of appellees o seek review of this order in the three-judge court nd in this Court.

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APRIL 1939.

APPENDIX

APRIL 11, 1939.

Hon. ROBERT H. JACKSON,
Solicitor General, Department of Justice.

DEAR MR. JACKSON:

In re: *Secretary of Agriculture* v. *L. B. Andrews, et al.*, Bureau of Animal Industry Docket No. 311.

The following statement contains an outline of the Secretary's proceedings in the case referred to above, commonly known as the *Morgan* case, subsequent to the decision of the Supreme Court on April 25, 1938 (304 U. S. 1).

The Secretary issued an order on June 2, 1938, reopening the proceedings and directing that the findings of fact and order of June 14, 1933, be served on the respondents as the tentative findings of fact and order. The Secretary's order of June 2, 1938, allowed the respondents thirty days in which to file exceptions and to enter any motions which they might choose to make. At the request of the respondents, the time was subsequently extended to August 15, 1938.

On August 13, 1938, the New Amsterdam Casualty Company, which appeared specially for respondent Harry J. Kennaley, moved to vacate the order of June 2 on the ground that the death of Harry J. Kennaley made it impossible to secure a full hearing and thus cure the prior error.

On August 15, 1938, the respondents filed their exceptions to the tentative findings of fact and or-

der. At the same time, they also filed an affidavit of bias and prejudice, an affidavit as to changed conditions since the closing of the evidence, a statement objecting to the procedure and the rulings of the examiner, and further objections with respect to the Secretary's order dated June 2, 1938, reopening the proceedings.

On August 26, 1938, the Secretary rendered an opinion on two motions and reserved rulings upon all the other motions. He overruled the motion to vacate the proceedings on account of bias and prejudice. He granted the motion of the respondents requesting that the proceedings be opened for the taking of evidence as to change of conditions subsequent to June 14, 1933. The Secretary issued an order designating an examiner for the purpose of taking additional relevant and material evidence. In this order, the Secretary directed that, before the taking of such evidence, the examiner should hear the parties with respect to the exceptions filed and, after hearing argument and the additional evidence, the examiner should prepare and submit a report to the parties in accordance with the rules of practice.

Pursuant to the order of the Secretary, the examiner held a hearing, beginning on September 12, 1938, in Washington, D. C. At that time, the exceptions filed by the respondents were argued both by counsel for respondents and counsel for the Government. Following the argument, the examiner received additional evidence. An adjourned hearing was held in Kansas City, Missouri, on October 3, 1938.

After the close of the hearing, the examiner called upon counsel for the respondents and counsel

for the Government to submit to him proposed findings of fact and a proposed order. This was done.

The examiner, on January 17, 1939, issued his report to the parties, in accordance with the procedure prescribed in the "Order Promulgating Rules of Practice to Govern Proceedings Under the Packers and Stockyards Act, 1921, as amended" (Sept. 14, 1936; 1 Fed. Reg. 1362).

Counsel for the respondents filed a motion to suppress the examiner's report and grant a rehearing. By order of March 4, 1939, the Secretary of Agriculture denied this motion.

Counsel for respondents and counsel for the Government submitted their exceptions to the examiner's report and on March 29, 1939, they argued such exceptions before the Secretary of Agriculture. The Secretary now has the case under consideration.

Sincerely yours,

MASTIN G. WHITE,
Solicitor.

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